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No. 05-1518

In The

Supreme Court of the United States

WASCO PRODUCTS, INC.,

Petitioner,

v.

SOUTHWALL TECHNOLOGIES, INC.
AND BOSTIK-FINDLEY, INC.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

REPLY BRIEF OF WASCO PRODUCTS, INC.

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I. INTRODUCTION

Petitioner Wasco Products, Inc. submits this brief Reply to respond to points raised in the Brief in Opposition ("Opposition") filed by Respondent Bostik Inc. ("Bostik").

Bostik's reliance on *Wyatt v. Union Mortgage*, for a rule that a plaintiff must plead in anticipation of an affirmative defense is misplaced because, as is discussed below, that question was not before the Court in *Wyatt*. *Wyatt* does, however, emphasize that, under California substantive law, mere agreement between multiple parties to jointly commit wrongful acts is sufficient to establish a conspiracy which will toll the statutes of limitations from running.

Bostik emphasizes the Panel's improper reliance on *Varner v. Peterson Farms*, 371 F. 3d 1011 (8th Cir. 2004) in support of its Decision. As is set forth below, *Varner* is nothing more than a restatement of the well recognized rule that, where claims appear time barred on the face of the complaint, a plaintiff must plead around the time bar.

Finally, contrary to the District Court Opinion, (the Ninth Circuit never reached the issue) the Complaint contained sufficient allegations identifying the conspiracy. Indeed, Wasco alleged a joint venture and identified the meetings where the parties' misrepresentations and marketing plans were discussed. Accordingly, the Court should grant the Petition since the issues presented are far more important than the mere academic exercise Bostik suggests.

II. DISCUSSION

A. Bostik's Reliance Upon *Wyatt* For The Proposition That Any Plaintiff Must Plead Allegations Of Conspiracy In Anticipation Of An Affirmative Defense Is Misplaced

In its Opposition, Bostik argues that, contrary to other theories or facts negating an affirmative defense:

> [Conspiracy] operates as a tolling doctrine *only* if it is first asserted as part of an underlying claim. If conspiracy is not part of the legal theory of the underlying claims it cannot be used to toll the statute of limitations.

Opposition at 6-7. (Emphasis in original.) Of course "conspiracy" is not an independent legal theory, it simply is a doctrine by which additional parties may be held to account for the wrongful conduct which they aid or participate in to some degree. It has the added benefit of increasing the number of parties responsible. Although *Wyatt v. Union Mortgage Company*, 24 Cal. 3d 773, 157 Cal. Rptr. 392 (1979) recognizes the tolling effect of the "last overt act" doctrine, the *Wyatt* Court was not faced with the issue presented here (the *Wyatt* complaint leveled conspiracy allegations at 15 of the 16 defendants) and could not possibly have intended the result Bostik suggests.[1] To so hold would mean that any plaintiff who

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[1] Also contrary to Bostik's claims (p. 8 of the Opposition), wrongful acts (such as repeated unfair and misleading acts pursuant to a deceptive marketing strategy) can give rise to repeated claims without benefit of the last overt act doctrine resulting from a conspiracy. "Plaintiff's claim for unfair competition would not be barred by the four year statute of limitations since the alleged wrongs (*i.e.*, the wrongful use and dilution of Suh's service marks) are multiple, continuous acts, and some of these acts have occurred within the limitations period." *See*

(Continued on following page)

discovered facts supporting a "conspiracy" during Discovery phase in an action and was faced with a motion for summary judgment would be prevented from asserting the conspiracy in opposition to the motion. The result Bostik suggests makes little sense.

B. Contrary To The Opposition, The Panel's Holding That A Plaintiff Is Required To Affirmatively Plead The Basic Elements Of A Conspiracy To Toll The Statute Of Limitations Even If They Are Only Raised In Opposition To Summary Judgment Is A Misapplication Of Eighth Circuit Precedent

Bostik notes that the Panel held a plaintiff must affirmatively plead the elements of conspiracy in anticipation of a statute of limitations defense even if they are raised only in opposition to a motion for summary judgment. Bostik Opposition at 6. The Panel's Decision supports this holding by a single reference to *Varner v. Peterson Farms*, 371 F. 3d 1011 (8th Cir. 2004). Contrary to the Panel's reference and Bostik's Opposition, the Decision is clearly an unwarranted extension of *Varner*.

In *Varner*, the Court found the plaintiff farmers' securities fraud and related antitrust claims were time barred on the face of the complaint and the plaintiffs did not plead fraud, concealment or conspiracy to toll them.

Suh v. Yang, 987 F. Supp. 783, 795 (N.D. Cal. 1997). Likewise, *Johnson v. Methodist Med. Ctr. of Ill.*, 10 F. 3d 1300 (7th Cir. 1993) is no help to Bostik as the Court simply found that a negligence theory could not defeat a motion for summary judgment on non-negligence claims.

Id. at 1016-1017. Accordingly, the District Court properly granted motions to dismiss.

The *Varner* Court did not rule that in all cases a party must plead conspiracy theories in anticipation of matters to be asserted in an answer. The page reference set forth by the Panel in its decision (371 F. 3d at 1019-1020) discusses the tolling of claims due to continued wrongful conduct (conspiratorial or violations of anti-trust provisions) but makes no reference to an affirmative pleading requirement in a complaint. *Varner* was nothing more than a recapitulation of the rule recognized in the Petition that, where the claims appear time barred on the face of the pleading, a party must plead facts or theories to "toll" the running of the statutes of limitations.

Quite simply, other than the Panel's Decision itself, there is no support for the Panel's new requirement that a plaintiff anticipate an affirmative defense of the statute of limitations that does not appear on the face of the complaint, and assert a theory (conspiracy, contractual tolling, and equitable tolling) and facts supporting that theory in the complaint.

C. Although Wasco's Conspiracy "Theory" Was First Pleaded In Response To Motions For Summary Judgment, Wasco Alleged The Respondents' Joint Venture And Acts In Furtherance Of The Conspiracy In The Complaint

As set forth in the Petition at p. 3, the misleading and unfair acts and practices prohibited by California's Unfair Competition statutes do not have to be fraudulent nor does the conspiracy to commit them have to be fraudulent: "as

long as two or more persons agree to perform a wrongful act, the law places civil liability for the resulting damage on all of them, regardless of whether they commit the tort themselves." *Wyatt, supra*, 24 Cal. 3d at 784. "Furthermore, the requisite concurrence and knowledge may be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances." *Id.* at 785.

To state an Unfair Competition claim, Wasco was only required to demonstrate that Southwall and Bostik received property (money) from the sales of the defective Heat Mirror technology (including the Bostik sealant) through unfair and misleading acts. *People v. Beaumont Investment Ltd.*, 111 Cal. App. 4th 102, 128-130 (2003).

Wasco's Complaint did not contain a pleaded claim of "conspiracy" but it did allege a joint venture (conspiracy) whereby both the parties knew of the misrepresentations made by both regarding the sealant and Heat Mirror technology and both profited:

> Southwall and Bostik worked on behalf of each other and as the agent of the other in furthering this common agenda. Bostik and Southwall both profited from the *joint venture*.

Complaint at ¶ 16; App. 47. (Emphasis supplied.) This allegation, coupled with the following and other detailed allegations, certainly satisfies any need for Wasco "to give defendants adequate notice to defend against the charge." Panel Decision at App. 4.

A partial identification of the pattern of joint misrepresentations includes Bostik and Southwall's joint agreement to develop the Heat Mirror sealants, the subject of the misleading marketing sheets claiming a 200 °F Service

Temperature Range that both Appellees distributed before and after meeting and agreeing that there was no support for such a representation. Complaint ¶ 16; App. 46-47. Exhibit E to the Complaint is a Bostik Memorandum: The "joint development program" by Bostik Inc. and Southwall Technologies was a success.

The Complaint specifically alleged the Data Specification Sheets (Complaint Exhibits D and I) used for marketing the material contained the misrepresentation that the sealant could operate in 200 °F temperatures when both knew the sealant could not safely operate in such 200 °F temperatures. Complaint ¶ 29; App. 52.

Wasco specifically pleaded and attached Exhibit R to the Complaint, a memorandum confirming a September 23, 1991 telephone discussion between Roger Iles of Southwall and John Duffy of Bostik (technical experts) wherein they confirmed that the sealant's operating limit was at least 40 °F less, or only 160 °F, and that exposure to higher temperatures (up to 200 °F), would lead to premature sealant failure and damaged windows. Complaint ¶¶ 51, 52; App. 62-63.

Wasco specifically pleaded that at a March 30, 1992 meeting at Southwall's headquarters in Palo Alto, Bostik and Southwall representatives discussed the fact that the "200 °F sealant" did not possess a 200 °F Service Temperature Range and attached Southwall's typed notes of the meeting as Exhibit T. Complaint ¶ 58; App. 65.

Wasco specifically pleaded that Bostik and Southwall concealed the temperature service deficiency from even their own employees and others, despite field observations (such as the Gibson house) documenting premature failure

of the sealant due to high temperatures. Complaint ¶¶ 58, 59; App. 65, Exhibits U, V.

Wasco specifically pleaded that Southwall vouched for the Bostik sealant advising manufacturers and distributors such as Wasco that the jointly developed sealants which were marketed as having a 200 °F Service Temperature Range had been "extensively tested." Complaint ¶ 20; App. 48. Wasco attached the Southwall representation as Exhibit F. Wasco pleaded that Bostik and Southwall knew the representations made regarding the sealants were false. Complaint ¶ 99; App. 83.

Wasco specifically pleaded that Bostik and Southwall discussed the temperature resistance deficiency of the sealants and concealed the fact from Wasco. Complaint ¶ 98; App. 83.

Wasco specifically pleaded Bostik's deceptive practices in the Fifth Claim for Relief (Bus. & Prof. Code Section 17200, *et seq.*) at Paragraph 116, App. 88-89; Southwall's deceptive practices in the Sixth Claim for Relief (Bus. & Prof. Code Section 17200, *et seq.*) at Paragraph 121, App. 90; and Bostik and Southwall's deceptive advertising and marketing practices in the Seventh Claim for Relief (Bus. & Prof. Code Section 17500, *et seq.*) at Paragraphs 123-127, App. 91-92.

To the extent that "conspiracy" allegations were required to afford "adequate notice" to Bostik and Southwall of their joint efforts to develop, deceptively market and jointly conceal the true temperature resistance of the jointly developed sealants from their customers, such allegations were contained in the Complaint.

III. CONCLUSION

For the reasons set forth in the Petition and further developed in this Reply, Wasco Submits that the Ninth Circuit Panel's extension of the Federal Rules of Civil Procedure requiring a plaintiff to plead in anticipation of an affirmative statute of limitations defense is contrary to the precedent of this Court, the Ninth Circuit itself and the other Circuit Courts of Appeal, the laws of the State of California and was error.

Respectfully submitted,

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